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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

Simon J. Pinhas, M.D.
Cross-Petitioner,

vs.

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER, ARTHUR N. LURVEY; RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; and WEISSBURG & ARONSON,
Respondents to Cross-Petition.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does California's statutory system of judicial review of private hospital staff privilege decisions give rise to "joint participation" between state officials and private actors so as to constitute "state action" under the Fourteenth Amendment?

2. Does the entire California statutory scheme designed to assure the competency of physicians, which system necessarily involves the participation of private hospitals and their medical staffs, the state judiciary, and the state licensing authorities constitute "state action" under the Fourteenth Amendment?

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LIST OF PARTIES

All parties are identified in the List of Parties contained in the Petition for Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in the Appendix to the Petition for Certiorari and is reported as

Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir. 1990).

JURISDICTION

The opinion of the Court of Appeals issued on July 26, 1989, and was amended and superseded, upon the denial of Petitions for Rehearing filed by all parties, on January 25, 1990.

This Cross-Petition for Certiorari is being filed in express reliance upon rule 12.3 of the Rules of the Supreme Court. The Petition for Certiorari was received on April 27, 1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

California Code of Civil Procedure §1094.5 provides in relevant part:

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner.

* * *

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Notwithstanding subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safety Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the findings are not supported by the weight of the evidence.

(e) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court

is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

STATEMENT OF THE CASE

In this case, Dr. Simon J. Pinhas, a surgeon, claims that he was deprived of his hospital staff privileges at Midway Hospital Medical Center ("Midway") in Los Angeles in a manner violative of the Due Process Clause of the Fourteenth Amendment and Section 1 of the Sherman Antitrust Act. After Midway convened peer review proceedings against him, he brought suit in U.S. District Court against the hospital, its administrators, their attorneys, and his physician-competitors. The District Court dismissed Pinhas' Complaint.

On appeal, the Ninth Circuit affirmed the dismissal of Pinhas' due process claim but reversed the dismissal of his antitrust claim. As to the due process claim, the Court found that Pinhas had failed to demonstrate that the peer review process initiated by a private hospital sufficiently demonstrated "state action" under the Fourteenth Amendment, relying on this Court's decisions in *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922 (1982) and

Blum v. Yaretsky, 457 U.S. 991 (1982). As to the antitrust claim, the Court, relying on *Patrick v. Burget,* 486 U.S. 94 (1988), held that the antitrust state action doctrine did not protect peer review decisions from the application of the antitrust laws.

All of the defendants have filed a Petition for Certiorari to this Court seeking to have this Court review the Ninth Circuit's reinstatement of Pinhas' antitrust cause of action. Pinhas has responded with a Brief in Opposition and has also filed a Cross-Petition for Certiorari, asking this Court to consider the dismissal of his due process claim.

REASONS FOR GRANTING REVIEW

I.

THIS COURT SHOULD DECIDE WHETHER CALIFORNIA'S SYSTEM OF JUDICIAL REVIEW OF A PRIVATE HOSPITAL'S PEER REVIEW DECISIONS CONSTITUTES "STATE ACTION" UNDER THE FOURTEENTH AMENDMENT

Peer review proceedings of medical practitioners have become a substantial component of the relation between individual physicians and hospital conglomerates. Peer review proceedings, once limited to the occasional collegial removal of an errant or impaired practitioner, are now used and misused, nationwide, as a forum for resolution of economic, political, and professional disputes. There are literally millions of peer review decisions made each year. Amicus Curiae Brief of the American Medical Association, at 15-16, filed in *Patrick v. Burget,* 108 S.Ct. 1658 (1988), 86-1145.

Congress, for the first time in the history of the Nation, has intervened in the regulation of "peer review" proceed-

ings by passage of the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11111 et seq. Congress made findings in that statute of important national needs associated with peer review.[1]

The states, with California in the lead, increasingly involve themselves in encouraging proper peer review, controlling peer review, controlling the judicial review of peer review, and controlling the consequences — by reporting statutes — of peer review proceedings. California's Legislature has made findings similar to those of

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[1] "The Congress finds the following:

(1) The increasing occurrance of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in the effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." Section 402, Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11101.

Congress in its recently enacted amendments to its statutory regulation of peer review.[2]

Congress also recognized that potential pretextual, vindictive, and unjustified peer review required constraints. Congress recognized that the failure to provide a fair hearing would give rise to antitrust liability, as well as a civil rights claim for damages caused by Due Process violations. HCQIA therefore establishes certain procedures which, if followed, can immunize a hospital and others from antitrust claims. But at the same time, Congress explicitly provided that these damage limitations

> "... shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil

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[2] "(a) The Legislature hereby finds and declares the following:

* * *

(3) Peer review, fairly conducted, is essential to preserving the highest standards of medical practice.

(4) Peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care.

(5) Peer review, fairly conducted, will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners.

(6) To protect the health and welfare of the people of California, it is the policy of the State of California to exclude, through the peer review mechanism as provided for by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition.

(7) It is the intent of the Legislature that peer review of professional health care services be done efficiently, on an ongoing basis, with an emphasis on early detection of potential quality problems and resolutions through informal educational interventions." California Business & Professions Code § 809(a).

Rights Act of 1964, 42 U.S.C. 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. 1981, et seq."

This case presents the very due process claims which Congress recognized, preserved and permitted under HCQIA. Furthermore, it raises an issue specifically not addressed in *Blum v. Yaretsky,* 457 U.S. 991 (1982): Whether review and approval by the State of a private action makes the State a "joint participant" in the decision-making and thus activates Fourteenth Amendment protections. This Court should decide whether California's system of judicial review of a private hospital's peer review decisions constitutes "state action" for purposes of the Fourteenth Amendment.

A. Important Violations Of Due Process Are Involved.

The violations of due process alleged include:

(a) The hospital's finder of fact, the judicial review committee, over the objection of Dr. Pinhas, contained two physicians who are in direct economic competition with Dr. Pinhas. Appendix, p. A-47.

(b) The hearing officer, a lawyer with substantial economic ties to the law firm representing the hospital, was appointed by the hospital over the objections of Dr. Pinhas. Not only was he biased but he refused to permit or respond to voir dire which would disclose that bias. Appendix, pp. A-48-50.

(c) The hospital denied Dr. Pinhas the right to be represented by retained counsel at the hearing or at any stage of the proceedings before the Judicial Review Committee. Appendix, p. A-50.

(d) The hospital attempted to intimidate and intimidated Dr. Pinhas' witnesses. Appendix, pp. A-52-53.

(e) The hospital precluded Dr. Pinhas from calling two important witnesses. Appendix, p. A-53.

(f) The hospital administrators commenced proceedings in retaliation for an unrelated dispute. Appendix, pp. A-42-46.

Counsel represents to this Court that, if permitted to pursue his claim under 42 U.S.C. § 1983, Dr. Pinhas will seek leave to amend his complaint to add the following allegations of due process violations:

(g) The hospital imposed the burden on Dr. Pinhas to disprove its charges.

(h) The hospital refused to produce documents in its possession necessary for Dr. Pinhas's defense.

(i) The hospital filed a report with the state licensing authorities which implied that it disciplined Dr. Pinhas based upon adverse findings on all charges against him, when in fact he prevailed on 6 of the 7 charges.

(j) Members of the hospital's internal appellate review panel admitted at the appellate review hearing that they had discussed Dr. Pinhas's case *ex parte* with his opposing counsel, but refused to answer voir dire about these *ex parte* discussions on the claim of attorney-client privilege between the members of the Appellate Review Committee and his opposing counsel.

B. This Case Raises Issues Left Open In Prior Decisions.

In *Blum v. Yaretsky*, 457 U.S. 991 (1982) this Court considered whether a private nursing home's decision to discharge or transfer a Medicaid patient satisfied the "state action" requirement of the Fourteenth Amendment. In concluding that such a decision was not state

action, this Court addressed a number of arguments raised by the parties. *Blum*, *supra*, at 1005-1012. One argument which it did not consider, because it found the argument to be *factually inapplicable*, was the following:

> "[E]ven if the State does not command the transfers at issue, it reviews and either approves or rejects them on the merits." *Id.*, at 1010.

This case now presents that issue for proper consideration in light of California's system of judicial review of hospital staff privileges decisions.

The Ninth Circuit in *Pinhas* acknowledged the scope of judicial review available by statute in California:

> ". . . California is actively engaged in reviewing peer-review decisions. Such review is created by statute under Cal.Civil Proc.Code § 1094.5 (West Supp. 1989) (reviewing quasi-judicial decisions) and Cal.Civ.Proc.Code § 1085 (West 1980) (reviewing quasi-legislative administrative proceedings).* (Footnote number deleted; footnote in margin) The plethora of cases cited by appellees demonstrate the willingness of California courts to entertain chal-

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* (Footnote from Quotation) California law recognizes two types of mandamus review of the decisions made by hospitals with regard to physician medical staff privileges. Where a physician's medical staff privileges have been denied, suspended or terminated on the ground the physician has not demonstrated an ability to comply with established standards, that administrative decision is classified as 'quasi-judicial' and review is by administrative mandamus. However, where the physician has had privileges denied or curtailed because of the implementation of a 'policy' of the hospital, the administrative action is classified as 'quasi-legislative' and reviewable by traditional mandamus.

Hay v. Scripps Memorial Hosp.-La Jolla, 183 Cal.App.3d 753, 758, 228 Cal.Rptr. 413, 417 (1986) (citations omitted).

lenges to the peer-review process. The function of the trial and appellate courts, however, is limited under both types of proceedings.

> [Under Section 1094.5,] if the decision was substantively rational, lawful, not contrary to established public policy and the proceedings were fair, a court may not substitute a judgment for that of the governing board even if it disagrees with the board's decision. The scope of review in traditional mandamus proceedings [under section 1085] is limited to an examination of the record of the hospital proceedings to determine whether the action taken was substantively irrational, unlawful or contrary to established public policy or procedurally unfair.
>
> *Hay v. Scripps Memorial Hosp.-La Jolla*, 183 Cal.App.3d 753, 758, 228 Cal.Rptr. 413, 417 (1986) (citations omitted)." *Pinhas, supra*, 894 F.2d at 1030.

Despite the Ninth Circuit's expressed understanding of the judicial review system in California applicable to peer review decisions, the Court failed to give due consideration to this process in determining whether respondent had demonstrated "state action" under the Fourteenth Amendment.

In doing so, the Ninth Circuit's decision has effectively exempted from Constitutional review a substantial area of decision-making where precious property rights are placed in jeopardy pursuant to an elaborate governmentally regulated decision-making system. Those decisions can ultimately, through the above-referenced system of

judicial review and approval, become the decisions of the state.[3]

The Ninth Circuit examined the appropriate decisions of this Court in dealing with the respondents' state action claim. However, it failed to apply them properly. The Court articulated the question to be decided:

> "The central inquiry in determining whether a private party's actions constitute 'state action' under the fourteenth amendment is whether the party's actions may be 'fairly attributable to the State'. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). To this end, the Court has followed a two-part analysis: 'First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.' *Id.*" *Pinhas, supra*, at 1033.

The Ninth Circuit acknowledged that there was little doubt about the first element. The Court found that the state statutory mechanisms requiring peer review in both private and public hospitals were a "rule of conduct

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[3]In fact, they have here. Petitioners in their Petition call to this Court's attention (Petition for Certiorari at page 2) a fact which they never brought to the attention of the Ninth Circuit, namely that a California Superior Court, ruling on Pinhas' Petition for a Writ of Mandate, found that the peer review decision in his case was based on substantial evidence. Although not part of the record in this case, and never presented to any court below, petitioners have reproduced this decision at pages A-30 to A-35 of the Appendix to this Petition for Certiorari. Petitioners also neglected to mention that the appeal of that decision is pending in the California Court of Appeal.

imposed by the state of California within the meaning of *Lugar.*" *Id.*

However, the Court found that the second element identified in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) was not present here:

> "Under the second prong in *Lugar*, Pinhas argues that the actions of those involved in the peer-review process should be construed as that of the state because of the statutorily created system of peer-review, which Pinhas argues, actively seeks to integrate private and public systems of review. State regulation of a private entity, however, is not enough to support a finding of state action. [citation] Pinhas must show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.' [citation] Additionally a state may be held responsible for the action of a private party only when it 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.' *Id.*" *Pinhas, supra*, at 1034.

In *Lugar*, a lessee obtained an *ex parte* writ of attachment pursuant to a state statute which was executed by a sheriff. This Court held that 42 U.S.C. § 1983 applied because the involvement of the sheriff gave rise to "joint participation" between private parties and state officials sufficient to satisfy the state action requirement. There is much more "joint participation" present here in the state judiciary's review and approval of what admittedly initiated as private action.

The Court erred in finding the absence of a "close nexus" between the state and the challenged action. Significantly, the Court gave just minimal consideration to the California system of judicial review in reaching its conclusion (despite having discussed that system at length in the earlier part of its decision dealing with antitrust "state action".) This Court should consider whether California's system of judicial review of peer review proceedings, like the judicial involvement in *Lugar*, makes the state a "joint participant" in the decision-making and transforms the private actor into a "state actor" for purposes of the Fourteenth Amendment.

II.

THIS COURT SHOULD DECIDE WHETHER CALIFORNIA'S ENTIRE STATUTORY SYSTEM OF PEER REVIEW CONSTITUTES "STATE ACTION" UNDER THE FOURTEENTH AMENDMENT

The statutory scheme enacted by California to ensure competency of physicians necessarily involves not only the participation of hospitals and their medical staffs, but also the state judiciary, and therefore constitutes Fourteenth Amendment "state action." The judicial involvement either (A) transfers the actual decision-making power to the State or (B) makes the State a joint participant in the decision, thus transforming a private actor into a state actor.

A. California Rests The Ultimate Decision-Making Power In Its Judiciary.

By involving the state judiciary in the peer review process, California removes the ultimate decision from a private party and transfers it to the State; thus, the Ninth Circuit erred in holding that this Court's decision in

Blum, supra, precludes Dr. Pinhas's claims. As was true in *Blum,* a private party made the original decision against Dr. Pinhas. In *Blum,* however, the aggrieved party had no right of judicial review. Here, California provides an elaborate system of judicial review after a private hospital conducts its peer review. *Pinhas, supra,* 894 F.2d at 1030.

The brief description of the California procedure in *Pinhas* omitted certain details. First, one of the purposes of the review is to determine "whether there was any prejudicial abuse of discretion." California Code of Civil Procedure § 1094.5(b). "Abuse of discretion is established if ... the findings are not supported by the evidence." *Id.* By asking its judges to decide if the evidence supports the findings, California removes the ultimate decision-making power from the private party and transfers it to its judiciary.

Second, California recognizes two different standards of judicial review:

> "Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." California Code of Civil Procedure, § 1094.5(c).

These two tests are commonly known as the independent judgment test and the substantial evidence test. In either case, review is limited to the evidence produced

before the administrative body, except under unusual circumstances. Section 1094.5(e); *Fairfield v. Superior Court,* 14 Cal.3d 768, 122 Cal.Rptr. 543 (1975); *Yen Eng v. Board of Building & Safety Commissioners,* 184 Cal.App.2d 514, 518, 7 Cal.Rptr. 564, 566 (1960).

Pursuant to subsection (d), California courts review decisions of private hospitals under the substantial evidence test and decisions of public hospitals under the independent judgment test. Application of either test renders the State the ultimate decision-making body. Even under the substantial evidence test, it is a *court* which decides the propriety of the physician's conduct, not the hospital. By testing the administrative record for "substantial evidence", the court does far more than simply enforce private remedies, it acts to enforce the action of the hospital. See *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478 (1988).

This judicial enforcement of the hospital's decision extends beyond the peer review process itself. In *Westlake Community Hospital v. Superior Court,* 17 Cal.3d 465, 131 Cal.Rptr. 90 (1976), the California Supreme Court held that an aggrieved physician must overturn the hospital's action using Section 1094.5 before pursuing common law tort claims against the hospital. In so doing, the Court foreclosed any avenue for vindication of rights except through the judicial process which enforces the action of the hospital.

This combination of unique features renders California's system subject to the due process requirements of the Fourteenth Amendment.

B. California's System Of Regulation And Judicial Review Makes The State A Joint Participant In The Deprivation Of Rights.

Even if judicial review of the peer review does not, of itself, constitute state action, it must be considered in the context of the entire California regulatory system. When so considered, it forms a crucial part of a system in which the State uses private actors to further its own goals.[4]

The California Legislature's most recent amendments to statutes regulating peer review stated that California was "opting out" of certain provisions of the "Health Care Quality Improvement Act of 1986", 42 U.S.C. § 11101, et seq. "because the laws of this state provide a more careful articulation of the protections for both those undertaking peer review activity and those subject to review, and better integrates public and private systems of peer review." Business and Professions Code, § 809(a)(9). The integration of these two systems accomplishes the Legislature's purpose to maximize the adequacy of medical care by weeding out incompetent physicians through limitations on medical staff privileges.

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[4]In order to show that defendants were acting "under color of state law" it is not necessary to allege that the action taken was authorized by the state; however, facts must be stated showing that defendants were clothed with authority of the state and were purporting to act thereunder. See, *Adickes v. S.H. Kress & Company,* 398 U.S. 144 (1970). The continued vitality of *Adickes* is proved by the Court's reliance on its holding in *Lugar v. Edmondson Oil Company Inc.,* 457 U.S. 922, 941 (1982). There, a § 1983 claim against private persons, causing a sheriff to seize plaintiff's property pursuant to a constitutionally suspected attachment statute, was upheld. There, as here, there is joint participation, pursuant to statutes which cause harm to Dr. Pinhas.

The public system of peer review involves the licensing of physicians by California's administrative licensing agency, the Bureau of Medical Quality Assurance ("BMQA"). BMQA conducts investigations of physicians to determine who should continue to hold a license based upon complaints filed by the public or by the filing of reports of adverse peer review proceedings undertaken by hospitals and/or their medical staffs (part of the "private" system).

To ensure that there is a private system of peer review, California's administrative regulations require that every "hospital shall have an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital." Cal. Adm. Code ("CAC"), Title 22, § 70703(a) (1988). According to Title 22, CAC § 70701(a)(1)(F), a hospital must have a governing body which must adopt written bylaws in accordance with legal requirements and its community responsibility which shall include "[s]elf-government by the medical staff with respect to the professional work performed in the hospital . . . ." The governing body shall "[a]ssure that medical staff by-laws, rules and regulations are subject to governing body approval . . . . [and] [t]hese bylaws shall include an effective formal means for the medical staff, as a liaison, to participate in the development of all hospital policy". § 70701(a) at (8), (9).

When a health care facility terminates, restricts or denies the medical staff privileges of a physician, it must promptly report to the BMQA all facts and circumstances that cause such decision to be taken. California Business and Professions Code § 805 et seq. California Code of Civil Procedure § 1094.5 provides for judicial review of all peer review proceeding decisions taken by California

hospitals to determine whether they were made pursuant to "fair procedure" and were supported by evidence. California law further provides that all peer review proceedings are confidential in malpractice actions, California Evidence Code §§ 1156 and 1157, and also provides immunity to participants in the peer review process, California Civil Code § 43.7 and *Westlake, supra.*

Most importantly, California has insisted that pursuant to section 805.5 of the California Business and Professions Code, all hospitals must seek copies of all reports of adverse peer review proceedings every time a physician either seeks reappointment to the hospital's medical staff or initially applies for medical staff privileges. Failure to do so is a crime. California Business and Professions Code, § 805.5(c). This dissemination of adverse results of peer review proceeding prevents a physician who has had his medical staff privileges denied or restricted at one hospital from moving to a different part of the state where he is unknown and applying for medical staff privileges at a hospital which would be unaware of this restriction or denial. The "805 Report" follows the physician everywhere regardless of whether adverse results were achieved at a "fair hearing" or not.[5]

This integration of public and private systems of peer review meets the "joint participation" test set forth in *Lugar v. Edmondson Oil Co.,* 457 U.S. 922 (1982) and the "symbiotic relationship" test set forth in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961) because California could not realize its goal of weeding out incompetent physicians without participation of hospitals

[5]In recent amendments to the "Health Care Quality Improvement Act of 1986," 42 U.S.C. § 11101, et seq., the Federal Government enacted a similar nationwide reporting scheme modeled after the California statute.

and/or their medical staffs in peer review proceedings. California could have implemented a system of peer review that was conducted by a governmental agency or an organization such as the California Medical Association which would come into a hospital setting to review its files concerning a physician who had been accused of incompetency by a member of the public, a member of the hospital's staff, and/or a member of the hospital's medical staff. Such a system would have been more costly and less efficient. Instead, California chose to make hospitals and their medical staffs joint participants with it by giving them primary responsibility in ensuring that incompetent physicians do not have medical staff privileges. California Business & Professions Code Section 809(a)(5) and (6).

Clearly, California "has exercised coercive power or has provided such significant encouragement, either overt or covert" by its statutory scheme to require a private system of peer review and integrating it into the public system of peer review such that the conduct of peer review proceedings by hospitals and their medical staffs "must in law be deemed to be that of the State." *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982).

The Ninth Circuit said in this case:

> "The challenged action here, the removal of Pinhas's staff privileges at Midway, cannot be attributed to the state of California. Only private actors were responsible for the decision to remove Pinhas." 894 F.2d at 1034.

"State action" cannot be so insulated. The state mandated the proceedings which resulted in the decision which is reviewable by the state and the state takes action upon the decision. California's statutes require that the state judiciary review the action in the peer review pro-

ceeding and a judgment is entered by the court in favor of or opposed to the physician. The state collects the results of the peer review, disseminates those results, and insists that other "private" actors consider them in making "private" decisions. The state itself uses peer review to inform its own licensing decisions. The decision is intertwined with government action, before, during and after its rendition.

This Court should review the California statutory plan for peer review and determine that that plan constitutes "state action" under the Fourteenth Amendment. Such a determination will require reversal of the dismissal of Dr. Pinhas's claim that he was, to his damage, deprived of due process by peer review proceedings which have no resemblance to any minimal concept of fairness or due process of law.

CONCLUSION

For the reasons set forth herein, cross-petitioner requests that the Court accept review and reverse those aspects of the decision below relating to the presence of "state action" under the Fourteenth Amendment.

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